Poleon ak Ajan v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41–86 OF 2009–II
RHODZARIAH BUJANG JC
4 DECEMBER 2009

Criminal Procedure — Charge — Framing of — Appellant charged with causing death by reckless and dangerous driving — Prosecution's failure to distinguish between two categories of offences under s 41(1) of the Road Transport Act 1987 — Whether charge bad for duplicity — Whether appellant prejudiced by prosecution's error — Whether appeal ought to be allowed

Criminal Procedure — Jurisdiction of court — High Court — Whether High Court should exercise its reversionary power to enter a conviction for careless driving under s 43(1) of the Road Transport Act 1987

Tort — Negligence — Road traffic — Dangerous driving — Causing death by dangerous driving — Appellant convicted and sentenced for reckless and dangerous driving under s 41(1) of the Road Transport Act 1987 — Appeal against conviction and sentence — Whether prosecution failed to distinguish between two categories of offences — Whether prosecution adduced sufficient evidence — Whether magistrate failed to consider appellant's defence — Road Transport Act 1987 ss 41(1) & 43(1)

On 7 January 2002 at about 8.10am, while one Apap ak Nguoh ('the victim') was in the middle of the road waiting to make a turn to a school which was on his right a lorry driven by the appellant collided into his vehicle. The collision caused the death of the victim. The appellant was charged with the offence of 'reckless and dangerous driving' under s 41(1) of the Road Transport Act 1987 ('the Act'), which had caused the death of the victim. The investigating officer ('IO') of the case, who arrived at the scene of the crime about half an hour after the accident, drew the sketch plan showing the brake marks and the glass fragments on the victim's right of way. The appellant's one line defence was that he had not seen the victim because the latter had come out from behind a van and then the collision happened. Based on the evidence of the position of the scratch marks and scattered glasses and brake marks of the appellant's lorry and other evidence the magistrate convicted and sentenced the appellant to 30 months imprisonment, a fine of RM5,000 and also, as required by the law, disqualified the appellant from holding a driving licence for three years from the date of the conviction. This was the appellant's appeal against that conviction and sentence. In his appeal the appellant submitted, inter alia, that

A the presence of scratch marks and scattered glass fragments were not sufficiently indicative of the point of impact and that undue weight was given to this evidence; that the prosecution's failure to tender the rough sketch plan rendered the neat sketch plan inadmissible; that the magistrate failed to give proper consideration to the evidence adduced by the defence and that there was a failure to distinguish between the two categories of offences under s 41(1) of the Act.

Held, allowing the appeal and convicting and sentencing the appellant on a revised charge:

(1) Section 41(1) of the Act provides for two separate offences, ie dangerous driving and reckless driving, which attract the same punishment. The prosecution in this case, who ought to be alive to this fact, had committed a fatal error in lumping these two offences together. Due to this error the appellant was prejudiced, in that, he had been unfairly burdened with disproving two separate ingredients of the offence. Since the charge was bad for duplicity, the appeal ought to be allowed and the conviction and sentence set aside. However, the overwhelming evidence against the appellant, which showed that he had driven without due care and attention and had failed to take heed of the presence of the victim on the road led the court to exercise its reversionary powers to enter a conviction for careless driving under s 43(1) of the Act (see paras 4, 6 & 14).

(2) The appellant's submission that the neat sketch plan was secondary evidence could not stand. Although the neat sketch plan was based on the rough sketch plan it was primary evidence in its own right because the witness who produced the documentary evidence was its maker, the IO, and he testified on its production in court (see para 7).

(3) While the position of the shattered glass and brake marks are indicative of the point of impact, they are not proof beyond reasonable doubt of the same. However, in this case there was no reason to disbelieve the IO who drew the sketch plan showing the brake marks and the glass fragments on the victim's right of way. As such, there was no reason to depart from the magistrate's finding of fact based on the scratch works and the scattered glass that the accident happened on the victim's right of way. Further, there was no error of law or judgment in the victim positioning himself in the middle of the road when he intended to make a right turn (see paras 8–10).

(4) Although the magistrate did not mention that he did not believe the appellant's defence, the sheer improbability of it on the face of the prosecution evidence meant that this failure was not prejudicial to the appellant (see para 13).

[Bahasa Malaysia summary

Pada 7 Januari 2002 pada lebih kurang 8.10 pagi, semasa Apap ak Nguoh ('mangsa') berada di tengah jalan, menunggu untuk membuat belokan ke sekolah yang terletak di sebelah kanannya, sebuah lori dipandu oleh perayu telah berlanggar dengan kenderaannya. Perlanggaran tersebut menyebabkan kematian mangsa. Perayu telah dituduh dengan kesalahan 'pemanduan melulu dan berbahaya' di bawah s 41(1) Akta Pengangkutan Jalan 1987 ('Akta tersebut'), yang mana menyebabkan kematian mangsa tersebut. Pegawai penyiasat ('PP') kes tersebut, yang tiba di tempat kejadian jenayah kira-kira setengah jam selepas kemalangan tersebut, telah melukis pelan lakar yang menunjukkan kesan brek tayar dan serpihan kaca di laluan sah mangsa. Pembelaan ringkas perayu adalah bahawa dia tidak nampak mangsa kerana mangsa datang dari belakang sebuah van dan kemudiannya perlanggaran tersebut berlaku. Berdasarkan keterangan daripada kedudukan kesan calar, kaca yang bertaburan, kesan brek tayar lori perayu dan keterangan lain, magistret mensabit dan menjatuhkan hukuman 30 bulan penjara terhadap perayu; denda sebanyak RM5,000 dan juga, sepertimana yang diperlukan dalam undang-undang; tidak melayakkan perayu daripada memegang lesen memandu untuk tiga tahun daripada tarikh sabitan. Ini adalah rayuan perayu terhadap dakwaan dan hukuman tersebut. Dalam rayuannya, perayu berhujah, antara lain, bahawa kewujudan kesan calar dan serpihan kaca yang bertaburan tidak mencukupi untuk menunjukkan tempat perlanggaran dan kepentingan telah diletakkan terhadap keterangan tersebut; bahawa kegagalan pendakwaan untuk mengemukakan pelan lakar kasar membuatkan pelan lakar rapi tidak boleh diterima; bahawa magistret telah gagal memberikan pertimbangan yang sesuai terhadap keterangan yang dikemukakan oleh pihak pembelaan dan bahawa terdapat kegagalan untuk membezakan antara dua kategori kesalahan di bawah s 41(1) Akta tersebut.

Diputuskan, membenarkan rayuan dan mensabit dan menjatuhkan hukuman atas pertuduhan yang disemak:

(1) Seksyen 41(1) Akta tersebut memperuntukkan dua kesalahan yang berasingan, iaitu pemanduan berbahaya dan pemanduan melulu, yang mana menjurus kepada hukuman yang sama. Pendakwaan dalam kes ini, yang seharusnya sedar akan fakta ini, telah melakukan kesilapan yang memudaratkan dengan mengabungkan kedua-dua kesalahan tersebut. Berikutan kesilapan ini, perayu telah diprejudis, yakni, dia, secara tidak adil, telah dibebankan untuk menyangkal dua faktor-faktor berasingan kesalahan tersebut. Memandangkan tuduhan tersebut adalah kependuaan yang tidak sah, rayuan seharusnya dibenarkan manakala pendakwaan serta hukuman diketepikan. Walau bagaimanapun, keterangan yang banyak terhadap perayu, yang mana menunjukkan bahawa dia telah memandu tanpa sikap berhati-hati dan prihatin dan kegagalan untuk menyedari kehadiran mangsa di jalan raya telah

menyebabkan mahkamah melaksanakan kuasa semakannya untuk memasukkan satu pendakwaan bagi pemanduan cuai di bawah s 43(1) Akta (lihat perenggan 4, 6 & 14).

(2) Hujahan perayu bahawa pelan lakar rapi adalah keterangan sekunder tidak berasas. Meskipun pelan lakar rapi tersebut adalah berdasarkan pelan lakar kasar tersebut, ia merupakan keterangan utama yang tersendiri oleh kerana saksi yang telah mengemukakan keterangan dokumentari tersebut merupakan pembuatnya; PP tersebut, dan dia telah memberi keterangan tentang penghasilannya di mahkamah (lihat perenggan 7).

(3) Meskipun kedudukan serpihan kaca dan kesan brek tayar menunjukkan tempat perlanggaran, ianya bukanlah bukti melampaui keraguan munasabah. Walau bagaimanapun, dalam kes ini, tidak terdapat sebab untuk tidak mempercayai PP yang telah melukis pelan lakar yang menunjukkan kesan brek tayar dan serpihan kaca di laluan sah mangsa. Oleh yang demikian, tidak terdapat sebarang sebab untuk menyimpang daripada penemuan fakta magistret berdasarkan kesan calar dan serpihan kaca yang bertaburan bahawa kemalangan tersebut berlaku di laluan sah mangsa. Selanjutnya, tidak terdapat kesilapan undang-undang atau penghakiman apabila mangsa telah memposisikan dirinya di tengah jalan raya di mana dia telah berniat untuk membelok ke kanan (lihat perenggan 8–10).

(4) Walaupun magistret tidak menyatakan bahawa dia tidak mempercayai pembelaan perayu, kebarangkalian yang tipis berdasarkan keterangan pendakwaan bermaksud kegagalan ini tidak memprejudis perayu (lihat perenggan 13).]

Notes

For a case on road traffic, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1501.

For cases on charge generally, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 952–1386.

For cases on High Court, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2300–2311.

Cases referred to

R v Guilfoyle [1973] 2 All ER 844, CA (refd)

Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)

Yahaya bin Mat & Anor v Abdul Rahman bin Abu [1982] 1 MLJ 202, FC (refd)

Legislation referred to

Road Transport Act 1987 ss 41(1), 43(1)

Bernard Philip Lanat (BP Lanat & Co) for the appellant.
Hairul Najmi (Deputy Public Prosecutor, Attorney General's Chambers, Sarawak) for the respondent.

Rhodzariah Bujang JC:

[1] The appellant was convicted and sentenced by the magistrates' court for an offence of 'reckless and dangerous driving' under s 41(1) of the Road Transport Act 1987 which had caused the death of one Apap ak Nguoh. The offence was alleged to have been committed on 7 January 2002 at about 8.10am at Mile 54, Kuching/Serian Road. He was sentenced to 30 months imprisonment and fined RM5,000 in default two months imprisonment. As required by the law, he was also disqualified from holding a driving licence (of any class) for three years from the date of the conviction which was 15 April 2009. The appellant's appeal is against both the conviction and sentence.

[2] In the appeal, the decision of the learned magistrate was attacked along these lines and I reproduced it in the order that they appeared in the appellant counsel's written submission but in a summarised form.

(a) The prosecution's failure to tender the rough sketch plan rendered the neat sketch plan and its key (exh P5 and exh P5k, respectively) inadmissible.

(b) The presence of scratch marks and scattered glass fragments were not sufficiently indicative of the point of impact.

(c) Undue weight was given to the brake marks which were on the road shoulder.

(d) Failure to give due weight to the victim's position in the middle of the road before the collision and the evidence of PW2 (Sjn Angat ak Dusi) that the point of impact was in the middle of the road.

(e) Failure to give proper and adequate consideration to the evidence adduced by the defence and giving reasons for rejecting the same.

(f) Failure to distinguish between two categories of offences under s 41(1) of the Road Transport Act ie causing death by reckless or dangerous driving.

[3] I will take the last point first.

TWO SEPARATE CATEGORIES OF OFFENCES

[4] I am in agreement with Mr Bernard Philip for the appellant that indeed

s 41(1) provides for two separate offences but which attract the same punishment — one is dangerous driving and the other is reckless driving. I also agree with him that case law has decided that the ingredients of each differ from the other, though the distinction maybe fine but they are still obviously different as reckless driving is a more serious offence than dangerous driving. In this regard, I would adopt the definitions from case law which he has highlighted to me to show the distinction as aforesaid.

> Reckless driving
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> to be guilty of the more serious category of the offence of reckless driving the driver (defendant) must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it (per Vincent Ng J in *Public Prosecutor v Zulkifli bin Omar* [1998] 6 MLJ 65).
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> Dangerous driving
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> (1) In a case of dangerous driving, the prosecution must establish that:
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> (a) a situation created by the accused is dangerous, eg, turning right into the said road without stopping to give way to through traffic; and
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> (b) when creating such situation the accused was at fault. Fault involves a failure; a failing below the care and skill of a competent and experienced driver in relation to the manner of driving and relevant circumstances (per Raja Azlan Shah) (now HRH the Sultan of Perak) in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 at p 258I right column to 259L left column. The appellant submitted that by failing to appreciate the principle of law governing the offence of reckless or dangerous driving, the honourable magistrate had misdirected himself as to whether the evidence in the present case was sufficient support the finding of either dangerous driving or *the more serious category of reckless driving*.
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> (per Low Hop Bing J (as he then was) in *Public Prosecutor v Ong Kia Chan* [2006] 7 MLJ 230; [2006] 4 CLJ 334). (Emphasis added.)

[5] The learned magistrate himself had relied on a quotation of Lawton J in *R v Guilfoyle* [1973] 2 All ER 844 which makes the same distinction. This quotation was lifted from the decision of Vincent J, in *Zulkifli*'s case and in view of the importance of this point to my judgment, I would like to also reproduce the same below.

> … cases of this kind (causing death by dangerous or reckless driving) fall into two broad categories; first, those in which the accident had arisen through momentary inattention or misjudgment ('the first category'), and secondly those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness ('second category').

> … to be guilty of the more serious category of the offence of reckless driving, the driver (defendant) must have created an obvious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to take it.

[6] The prosecution in this case has committed a fatal error in lumping the two offences together which error is inexcusable and prejudicial to the accused in that he had been unfairly burdened with disproving two separate ingredients of the offence. The learned magistrate could not be faulted wholly for this mistake as the prosecution themselves in drafting the charge should have been alived to the fact that under s 41(1) there are in fact two separate offences. On this score alone, I am prepared to allow the appeal and set aside the appellant's conviction and sentence under the original charge but before doing so, and to be fair to the prosecution, I would still consider the other points raised by Mr Bernard Philip.

THE ABSENCE OF THE ROUGH SKETCH PLAN

[7] I do not agree with his submission that the neat sketch plan is secondary evidence. It is a primary evidence in its own right although it was based on a rough sketch plan because the witness who produced the documentary evidence was its maker and he testified on it's production in court (see the evidence of PW6 (Chief Inspector John Sabadurai ak Frankie Alat) at pp 27 and 29 of the appeal record). The absence of the rough sketch plan merely goes to the weight of the document tendered and not it's admissibility. If his evidence on the content of the neat sketch plan is shaken in cross-examination or contradicted by other evidence, then the neat sketch plan would be rendered quite useless but in this case no such evidence emerged. Although he was cross-examined on it, the cross-examination did not have the shattering impact on the credibility of the witness with respect to this part of his testimony for the defence counsel merely put to him that the positions of the scratch mark, pieces of glasses and vehicles in the sketch plan were wrong.

POSITION OF SCRATCH MARKS AND SCATTERED GLASSES AND BRAKE MARKS ON THE ROAD SHOULDER

[8] In any accident case, the presence of the above are good indications of the point of impact, in the absence of any logical and reasonable explanation for their presence or positions on the road. The scattered glasses may in some cases been proved to have been moved and flung by the force of the collision but there must be evidence to induce the learned magistrate to depart from what really is an entrenched legal principle (see for instance the Federal Court's case of *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 — as the importance of scratch marks on the road and the Federal Court's case of *Yahaya bin Mat &*

Anor v Abdul Rahman bin Abu [1982] 1 MLJ 202 on the importance of shattered glasses on the road) I must stress however that whilst the position of these glasses and brake marks are *indicative* of the point of impact, it is not in itself proof beyond reasonable doubt of the same and evidence which contradicts the indication is still permissible under the law.

[9] In this case, there is no evidence to disbelieve PW6, the investigating officer of the case who went to the scene *half an hour* after the accident and who drew the sketch plan showing the brake marks and the glass fragments on the victim's right of way. As for the brake marks on the road shoulder, it is definitely made by the appellant's lorry for when PW6 went to the scene, the lorry was still there and I really failed to understand counsel's complaint that the learned magistrate attached too much importance to the brake marks and without appreciating that the ground was soft at the road shoulder. Soft or not, there cannot be any dispute that the lorry made the marks as the ground and 18 meters is quite a distance to travel before the lorry stopped. Reading his judgment, I did not see him attaching too much weight or giving too great an importance on the presence of the brake marks on the road shoulder. I see no reason also to depart from his finding of fact based on the scratch works and the scattered glasses that the accident happened on the victim's right of way.

THE VICTIM'S POSITION IN THE MIDDLE OF THE ROAD

[10] It is not disputed that the victim was in the middle of the road. He intended to make a turn to the school which is on his right. The lines dividing the two lanes of the road was a broken one and he has not committed any error of law or judgment by positioning himself there before making the turn so his position cannot be a subject of adverse comment by the defence.

THE APPELLANT'S DEFENCE

[11] His defence is actually condensed in one line ie that the victim came from behind a van and then the collision happened. I agree however, that the learned magistrate did not even mention let alone make a specific finding that he disbelieved him although it can be inferred from the conviction that he did.

[12] However, the fact that he did not do so — given that it is a one line defence and in the light of the sketch plan, the evidence of the eye witness to the accident (the victim's own son) and particularly in view of the sheer illogicality of that defence, his failure to do so is not fatal. I say illogical, because it is beyond comprehension that the victim would be so suicidal as to overtake a van and then turned right into the van's path of travel to make that turning to the right.

[13] Therefore, although the learned magistrate did not mention that he did not believe the defence story, the sheer improbability of it on the face of the evidence itself and the clear evidence of the sketch plan which shows where the point of impact was, means his failure is not prejudicial to the appellant.

THE FINAL DECISION

[14] Although I have earlier agreed that the charge was bad for duplicity and to allow the appeal by reason of it, nevertheless I find overwhelming evidence to show the offence of driving without due care and attention as it is obvious that the appellant had failed to take heed of the presence of the victim on the road. Thus, in the exercise of my revisionary powers, I enter a conviction for careless driving under s 43(1) of the Road Transport Act and sentenced the appellant to RM10,000 fine in default six months imprisonment. I also order that this conviction be endorsed on his driving licence.

Appeal allowed and appellant convicted and sentenced on a revised charge.

Reported by Kohila Nesan